United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

234

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 24,750

UNITED STATES OF AMERICA

v.

JAMES O. LEECH,
a/k/a JAMES LEEKS, APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOHN D. PERKINS,

ATTORNEY FOR APPELLANT
(Appointed by this Court.)

Cr. No. 534-70

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III

ISSUES PRESENTED

In the opinion of the appellant, the following issues are presented:

(1) Did the trial court err in refusing to grant appellant's motion to suppress the in-court identification of Phillip Marshall?

(2) Was the Court's charge to the jury concerning intoxication as a defense to a specific intent crime too vague to adequately appraise the jury of that defense?

(3) Was the manner in which the preliminary hearing was conducted prejudicial to the defendant?

Reference to ruling: Court granted motion to suppress lineup identification (Trans. pp. 83-5, motion to suppress)

This case has not been before this Court on a previous occasion.

STATEMENT OF THE CASE

In December of 1969, appellant, James O. Leech (hereinafter referred to as Leech), was arrested and charged with armed robbery of the liquor store at 924 - 10th Street, N.W., Washington, D.C., known as Jacobson's Liquor. The arrest warrant was supported by an affidavit which stated that one Willie Vinson observed Leech, carrying a paper bag, run through the alley in the vicinity of Jacobson's Liquor store while being chased by Mr. Robbins, the proprietor of the store.

Evidence at the trial indicated that a negro male entered Jacobson's Liquor store on Saturday, November 1, 1969, at approximately 10:58 a.m. and pointed a small dark revolver at the proprietor, and placed a brown paper bag on the counter and told the proprietor to fill it with money. The proprietor placed the contents of the cash register ($150.00 in currency) into the bag and the gunman took the bag and left the store.

Leech was given a preliminary hearing on these charges on January 26, 1970, and was held for the Grand Jury on a charge of robbery. On February 26, 1970, Leech was placed in a lineup and identified by Phillip Marshall, one of the employees who was in the liquor store at the time of the robbery, as the gunman who robbed the liquor store.

On March 31, 1970, the Grand Jury indicted Leech on a four-count indictment. Count 1 charged Leech with armed robbery (T 22 §3202 of the District of Columbia Code) of Jacobson's Liquor store. Count 2 charged him with the lesser included offense of robbery of the store, and Counts 3 and 4 charged Leech with assault with a dangerous weapon (T 22 §502 of the District of Columbia Code) on two employees of the liquor store, namely Harry Robbins and Phillip Marshall.

The case was tried on June 4, 1970, before a jury, and Leech was convicted on Counts 1, 3 and 4, and on October 1, 1970, he was sentenced to three to twelve years on Count 1, and three to ten years on Counts 3 and 4, respectively, the sentences to run concurrently.

THE PRELIMINARY HEARING

(See Transcript of the Preliminary Hearing dated Jan. 26, 1970, pp. 1-10.)

At a preliminary hearing held on January 26, 1970, Leech was bound over to the Grand Jury after a police officer, Harry Seamon, testified that he and his partner investigated the robbery and on the basis of their investigation were informed by Willie Vinson that he observed Leech running through the alley right after the robbery chased by the owner of the liquor store. The officer also testified that on or about November 24, 1969, he showed

eight photographs to the people who had been robbed, and from that group of photos they picked out a picture of Leech.

On cross-examination the officer admitted that the owners of the liquor store were unable to identify Leech from a series of photos he had shown them; that the only person who made an identification of Leech after viewing photos was Sarah Hart, who lived in an apartment approximately one block from the store. The police officer also stated that the only name Sarah Hart knew Leech by was "Philadelphia Red."

MOTION TO SUPPRESS IDENTIFICATION

On February 26, 1970, Leech was viewed at a lineup by Phillip Marshall, an employee of the liquor store, and identified as the gunman who robbed the liquor store. Leech's trial counsel moved to suppress any in-court identification resulting from the lineup, alleging that it was tainted, and he also requested that the Government establish an independent basis for making an in-court identification. At an oral hearing on this motion which was held on May 26, 1970, Leech's counsel called Officer Reiley of the Metropolitan Police Department who testified that Phillip Marshall identified Leech at the lineup in which Leech appeared with seven other young men who were then under detention. That the ages of the other men in the lineup

were 24, 23, 15, 18, 19, 18 and 19 respectively, whereas Leech was 42 years old (Tr. Motion to Suppress 9-11).

Mr. Nuzzio, an Assistant United States Attorney, also testified and said he told the witnesses that if they did not make an identification in the presence of all parties who were viewing the lineup that they are "out of the ballgame" and the Grand Jury would not take the case (Tr. Motion to Suppress 18, 22).

Phillip Marshall also testified, and in addition to confirming his identification of Leech at the lineup and giving his version of the facts concerning the robbery, stated that on three separate occasions he viewed photos shown to him by the police to ascertain whether he could identify the gunman who robbed Jacobson's Liquor store on November 1st (Tr. Motion to Suppress 37). His testimony concerning the photographs was confusing. He was first shown photographs approximately two weeks following the robbery when he was unable to make any identification from the photos (Tr. Motion to Suppress 38). Upon questioning by the Court he stated he had viewed photographs only twice (Tr. Motion to Suppress 39). That he had not identified Leech among the photos the first time but had identified a photo of Leech at the second viewing which occurred approximately three weeks before the lineup. He then stated he also viewed a photograph of Leech (from about eight shown him

by the police) just before he identified Leech at the lineup (Tr. Motion to Suppress 40-45). He said the police wanted to be sure he could identify the guy, and when he viewed the lineup he studied the individuals in it carefully.

Later, on redirect examination by the Government (Tr. Motion to Suppress 47, 49), Phillip Marshall was unsure whether he chose a photograph of Leech at the second viewing but was sure he identified one just before the lineup.

Officer Davidson then testified that several weeks after the robbery he interviewed Phillip Marshall and asked him if there was anything else he could add to the information he had previously given concerning the robbery. That Phillip Marshall then stated he had forgotten to mention in his first interview that the man who came into the liquor store had a scar over his eye (Tr. Motion to Suppress 66). Officer Davidson admitted, however, that the affidavit attached to the arrest warrant (issued December 8, 1969) which contained a description of Leech made no mention of a scar (Tr. Motion to Suppress 69). He also admitted there was nothing in the record indicating that Phillip Marshall had ever identified a photograph of Leech and if Phillip Marshall did identify a photograph of Leech that he had no knowledge of it (Tr Motion to Suppress 71).

The U. S. Attorney stated the Government had no information that Phillip Marshall had ever identified a photograph of Leech and stated it was the Government's position in this matter that Phillip Marshall was mistaken when he stated he made photographic identification of Leech (Tr. Motion to Suppress 76). The Court expressed skepticism at the Government's position (Tr. Motion to Suppress 81) and granted the motion to suppress the lineup identification, stating that it was unfair (Tr. Motion to Suppress 85) but held there was a sufficient independent basis for an in-court identification of Leech because Phillip Marshall had an opportunity to observe the individual who robbed the liquor store and give a very accurate description of Leech as the robber (Tr. Motion to Suppress 83, 84). The Court also advised the Government to conduct an investigation to determine whether there was any record of Phillip Marshall's having made a photographic identification of Leech (Tr Motion to Suppress 79, 80).

THE TRIAL

Harry Robbins, the owner of Jacobson's Liquor store, testified that on November 1, 1969, at slightly before 11:00 a.m., a man walked into the liquor store, showed Mr. Robbins a gun, placed a bag on the counter, told Mr. Robbins to put the money in the bag, and then lay down. Mr. Robbins testified that he followed the gunman's instructions by placing $150.00 in currency

into the bag. Mr. Robbins also testified that the gunman told him not to look at him, and again Mr. Robbins followed his instructions (Tr. 20, 21, 23). Thus Mr. Robbins was unable to give any description of the gunman, and was unable to identify Leech in the courtroom as the gunman (Tr. 26, 27).

Mr. Robbins stated there were two other employees in the store with him on the day in question, and two customers. The two employees were Phillip Marshall, who worked part time for the store, and James Walker, a porter. James Walker seemed to have disappeared after the robbery (Tr. 21, 22).

Mr. Robbins also testified that when the gunman entered the store he told Phillip Marshall, Walker, and the customers to lie down right away. That as soon as the gunman came into the store he told Phillip Marshall to lie down and Phillip Marshall complied with the order. That the spot where both he and Phillip Marshall lay was behind a wooden counter (Tr. 23, 30-33).

Phillip Marshall testified that when the gunman came in the store he was standing behind the counter to the right of Mr. Robbins, about eight or ten feet from the door (Tr. 79). He stated that he observed the gunman, who appeared to have been drinking (Tr. 79). He further testified that Mr. Robbins and the customers lay down on the floor as ordered, but that he remained standing and observed the gunman (Tr. 80, 91).

Phillip Marshall identified the gunman as being approximately forty years old, five feet six, or five feet seven inches tall, and weighing 160 to 165 pounds. He also testified that the gunman wore a dark three-quarter length coat, and had on dark trousers, and had a scar on the right side [sic] over his eye. Leech's counsel objected to testimony concerning the scar but his objection was overruled (Tr. 81, 82). Again over the objection of Leech's counsel, Phillip Marshall also identified Leech in the courtroom as the man who robbed the liquor store (Tr. 83, 84). On cross-examination Phillip Marshall was asked if his description of the gunman right after the robbery omitted any mention of a scar and if he had failed to mention anything about a scar until after viewing Leech in a lineup. He denied both assertions (Tr. 86). He admitted being shown photographs after the robbery but the Government objected to the next question - "And did you identify somebody from the photographs as being the man who came into the liquor store?" (Tr. 87) At a bench conference following this question, Leech's counsel stated he understood Phillip Marshall had never picked out a photograph of Leech. So if he picked a photo it must have been of someone else. The Government attorney stated that he did not identify anyone and then made an unclear reference to a distinction between picking Leech's photograph and picking him out of a lineup. Finally, it was apparently resolved at the bench conference that Phillip

Marshall said he did pick out Leech's photograph and that a police officer (Officer Davidson) said he did not. The conversation dealt with the motion to suppress and the Court said its recollection was that Phillip Marshall did testify he picked out a photograph of Leech and that Officer Davidson says he did not show him any, but he does not know if anyone else did so. Leech's trial counsel decided not to pursue the question (Tr. 87-90).

Sarah Hart testified that she was the resident manager of an apartment at 1020 - 10th Street, N.W., Washington, D. C., which was approximately one block from the liquor store (The liquor store was located at 924 - 10th Street, N.W.)(Tr. 92). On the day the robbery took place she says she saw a man running up the steps of the apartment with a brown paper bag in his hand. She identified Leech sitting at defense counsel's table as that man (Tr. 93). She heard an argument upstairs concerning the division of the money among Leech, Willie Vinson, and someone named Lloyd. She overheard the argument from an adjacent apartment (Tr. 94). Later she stated that Leech came downstairs and asked her to lend him a hat and coat, and stated that he just robbed the liquor store. She asked him how he could rob a liquor store because he was drunk. He thereupon showed her the police cars outside and offered to give her ten dollars if

she would let him sleep there until the police left. She further testified that her boyfriend did not want him there, and he left the apartment shortly thereafter (Tr. 95). She stated that he had on green khaki pants, a green shirt, and black quarter-length [sic] coat. She also stated that he was drinking and was reeling and rocking, and you could smell whiskey on him (Tr. 96, 97). Sarah Hart also testified that she had seen Leech in the neighborhood from time to time prior to the robbery, but had never spoken to him except in passing and thought he was called "Evans" (Tr. 98, 102, 103). She also stated that she had seen Willie Vinson in the neighborhood on the day prior to the trial (Tr. 99).

Officer Davidson of the Metropolitan Police testified next. He stated that he had investigated the robbery on November 1, 1969, and interviewed Miss Hart and Phillip Marshall at that time (Tr. 106). That Phillip Marshall had given him a description of the man who robbed the liquor store. Officer Davidson's recollection of that description was substantially identical with that given in Phillip Marshall's own testimony. The officer also stated that Phillip Marshall told him the gunman had a scar over his right eye (Tr. 107). On cross-examination, Officer Davidson admitted that Phillip Marshall had not discussed the description of the gunman with him until two weeks after the

robbery. He also admitted that the police offense report which contained a description of the gunman made no reference to a scar over his right eye, but it did indicate that he had a mustache. The police offense report was taken shortly after the robbery (Tr. 108, 109). On re-direct it was established that the police offense report also indicated that the gunman appeared to be intoxicated (Tr. 111). The officer also stated that he had occasion to arrest Leech in December of 1969, at which time Leech had a light mustache (Tr. 112). The officer also testified that no police report or lookout or communication of any kind indicated that the gunman had a scar (Tr. 116, 117). Leech's counsel also attempted to ascertain from Officer Davidson just what information he obtained from Willie Vincent but he was dissuaded from pursuing this line of questioning by the Court at a bench conference. The Court said to allow the police officer to testify as to what Willie Vincent told him was obvious hearsay and most prejudicial and improper. The Government attorney stated "If it comes in about Willie it's all going to come out that he saw Willie Vincent run" (Tr. 114, 115).

Another police officer, Harry Seaner, then testified that he had mistakenly stated at the preliminary hearing that one "Philadelphia Red" was with Leech at the time of the robbery (Tr. 123, 124).

The defendant James Leech then testified. He stated that he lived at 1020 K Street, N.W., which is the west side of the liquor store, right on the corner (Tr. 126). That he had often seen the owner, Mr. Robbins, in the store (Tr. 128, 129). He testified he had seen Miss Hart in the neighborhood, but he did not know her, although he did know Willie Vincent (Tr. 127). He stated that on the morning the robbery took place he was working, catch out, for an Allied Moving Van. He could not recall the name of his employer or the exact location of his employment on that day (Tr. 127 - 129).

On cross-examination, he testified that he went into Jacobson's Liquor store almost every day, or at least on every day that he had money; that he lived right beside the store. He usually went into Jacobson's Liquor store in the late afternoons when he got off from work when he was working at Kelly's Labor. That the first time he saw Phillip Marshall was on February 26, 1970 (Tr. 128 - 130). He also stated that he was wearing a small mustache when arrested (Tr. 141), and that he was 5 feet 11 inches in height (Tr. 140) and had a scar over his eye (Tr. 139). A comparison of his height with that of the prosecutor indicated that he was 5 feet 8-1/2 inches tall (Tr. 140). Leech also testified he knew Willie Vincent; that Willie sometimes stayed with him (Tr. 133).

The defense closed its case with the stipulation that the description given on the offense report, which was taken the day of the robbery, was obtained from Phillip Marshall (Tr. 142).

ARGUMENT

I

THE COURT ERRED IN PERMITTING PHILLIP MARSHALL TO MAKE AN IN-COURT IDENTIFICATION OF THE DEFENDANT.

(Tr. 30, 32, 33, 80, 81, 87-90, 108, 109, and Tr. Motion to Suppress 37-45, 66, 69, 76, 77, 79 - 83)

Once a witness has identified a suspect at a lineup where unduly suggestive procedures are used, a grave doubt arises whether the subsequent in-court identification by the witness is actually based upon his opportunity to view the suspect at the time of the crime. The nagging question always remains - Isn't the witness's identification really based upon the observation he made at the lineup? "It is a matter of common experience that once a witness has picked out the accused at the lineup, he is not likely to go back on his word later on, so that in practice the issue of identity may in the absence of other relevant evidence for all practical purposes be determined there and then before the trial." United States v. Wade, 388 U.S. 218, 229 (1967), citing Williams and Hammelman, Identification Parades, Part I, (1963), Crim. L. Rev. 479, 482. "It is only in the most exceptional case that an in-court identifica-

tion will be said to be wholly uninfluenced by prior identification confrontation," and an in-court identification must be refused if any questionable or suggestive confrontation has previously occurred. United States v. Kinnard, 294 F. Supp. 286, 290 (D.C.D.C., 1968); noted in 71 ALR 2d 449.

Once the trial court has judged a lineup to be illegal, as it did in this case, the Government has the burden of proving an independent bases for an in-court identification by clear and convincing evidence, United States v. Wade, 388 U.S. 218, 240 (1967) supra; Hawkins v. United States, 137 U.S. App. D.C. 103, 420 F. 2d 1306 (1969); United States v. Harris, No. 23,254, decided Nov. 27, 1970, 98 WLR 2245, 2252. Some of the factors to be considered in meeting this burden are:

(a) Prior opportunity to observe the criminal act,

(b) The existence of any discrepancy between any pre-lineup description and the defendant's actual description,

(c) An identification prior to the lineup of another person,

(d) The identification of defendant by picture prior to the lineup,

(e) Failure to identify defendant on a prior occasion, and

(f) The lapse of time between the alleged act and the lineup identification. United States v. Wade, 388 U.S. 218, 241 (1967).

Phillip Marshall's testimony concerning his observation of of Leech at the scene of the robbery is clear and unequivocal. He was standing only eight to ten feet away, the lighting was good and he observed Leech from the moment he entered the store until he left (Tr. 80, 81). However, the testimony is not flawless. It is directly in conflict with that of Harry Robbins, the owner of the store, who testified that in a matter of seconds after the gunman entered the store he ordered everyone to lie down on the floor and Phillip Marshall complied with the order (Tr. 30, 32, 33). On the other hand, Phillip Marshall's testimony concerning the description of the gunman is almost too unequivocal. When it is remembered that he was facing a gun, it leads to a suspicion that his in-court testimony was buttressed by a view of the subject subsequent to the date of the offense. "Although positiveness of a witness is a relevant factor, it is to be weighed warily and in the realization that the most assertive witness is not invariably the most reliable one." Clemons v. United States, 133 U.S. App. D.C. 27, 408 F 2d 1230 (1968), Cert. denied, 394 U.S. 964 (1969).

Phillip Marshall also testified that Leech had a scar over his eye on the right side but the police offense report did not note this as part of his description (Tr. 108, 109). Officer Davidson also testified that several weeks after the incident

he asked Phillip Marshall if he wished to supply any additional information concerning the robbery, and he then mentioned the scar (Tr. Motion to Suppress 66). However, the description attached to the arrest warrant which was issued December 8, 1969, did not mention this scar (Tr. Motion to Suppress 69).

There is also the possibility that Phillip Marshall identified the photograph of another person as that of Leech prior to the lineup. Phillip Marshall testified that he was shown photographs on three occasions, and on two of those occasions he identified a photograph of Leech. The first occasion was two to three weeks prior to the lineup and the second was on the night of and just prior to his viewing of the lineup. On recross he stated he was not sure he made a photographic identification of Leech on the first occasion but he was sure he had done so on the night before the lineup (Tr. Motion to Suppress 37-45). Yet the Government states they have no record of his having identified a photo of Leech; they can find no police officer who recalls such an identification; it was the Government's position that Phillip Marshall was never shown pictures of Leech (Tr. Motion to Suppress 76, 79-83). This raised the obvious question of why the Government would show a picture of Leech to Sarah Hart but not to Phillip Marshall, who was an eye witness to the robbery (Tr. Motion to Suppress 76, 77).

Thus the testimony of the Government and one of its key witnesses is in direct conflict on the question of photographic identification and it is unclear whether Phillip Marshall identified another person prior to the lineup or identified a photo of Leech prior to the lineup, or failed to identify a photo of Leech on a prior occasion. This confusion was also evident at the trial as evidenced by the bench conference (Tr. 87-90). However, the jury did not have the opportunity to consider this ambiguity nor the tainted lineup procedure but was treated to the unequivocal testimony of Phillip Marshall concerning the man who robbed the liquor store. This is certainly not in keeping with the procedure taught by Clemons v. United States, 133 U.S. App. D.C. 27, 408 F 2d 1230, 1237 (1968), cert. denied, 394 U.S. 964 (1969); United States v. Harris, No. 23,254, decided Nov. 27, 1970, 98 WLR 2245, 2252; which would allow the jury to consider the pre-trial confrontation in assessing the witness's in-court identification testimony. The conversation at the bench conference concerning a photographic identification by Phillip Marshall indicated that Leech's counsel wished to inquire into some aspects of the pre-trial identification but was dissuaded from doing so by the Court.

Perhaps the most important factor in establishing an independent basis for an in-court identification is the lapse

of time between the alleged act and the lineup identification, Hawkins v. United States, 137 U.S. App. D.C. 103, 420 F. 2d 1306, 1309 (1969); United States v. Washington, 292 F. Supp. 284 (D.C.D.C. 1968). In United States v. Washington, a two-month time lag between the crime and the identification coupled with the reinforcing tendency of the tainted identification cast "serious doubt" on the validity of the in-court identification. For that reason the in-court identification was disallowed. In this instance the robbery occurred on November 1, 1969, yet Phillip Marshall did not view Leech in the lineup until February 26, 1970, a delay of almost four months. The alleged excuse for the delay, a mistake in the spelling of Leech's name (Tr. Motion to Suppress 16, 17), is totally unacceptable.

This case re-emphasizes the fact that the lineup is a crucial phase of the prosecution. If it is conducted in a prejudicial manner the Government has practically destroyed one of the key links in its chain of evidence. Once this has occurred the identification evidence should either be entirely excluded or the defendant should have the clear and unhindered right to place all of the facts before the jury so that it may properly weigh the identification testimony. United States v. Kinnard, 294 Fed. Supp. 286, 290 (D.C.D.C., 1968).

Because of the four-month delay between the alleged act and the identification, coupled with the prejudicial lineup

procedure, the conflict in the testimony of the eye witnesses to the robbery, and the confusion concerning photographic identification by Phillip Marshall, no independent basis for an in-court identification was established. Therefore the guilty verdict on all three counts should be set aside and the case should be remanded for a new trial.

II

THE COURT'S CHARGE TO THE JURY CONCERNING INTOXICATION WAS TOO VAGUE TO ADEQUATELY INFORM THE JURY OF THAT DEFENSE.

(Tr. 79, 95-97, 101, 102, 128, 143, 144, 162, 163; 194, 195,Tr. Motion to Suppress 31)

The transcript in this case was replete with evidence that Leech was intoxicated at the time of the commission of the offense. He lived next door to the liquor store that was robbed (Tr. 128); he used to go in there almost every day after work (Tr. 128); he looked sort of droopy in the eyes, sort of weavy looking (Tr. 79); he seemed to stagger (Tr. Motion to Suppress 31); he was drinking and reeling and rocking and you could smell liquor on him (Tr. 97); he went to an apartment approximately one block from the liquor store and got into an argument concerning the division of the money which attracted the attention of the occupants (Tr. 94, 95); he asked for help from Sarah Hart even though he had never spoken with her before except in passing (Tr. 96, 100, 101, 102), and he was asked by Sarah Hart

how he could commit a robbery when he was so drunk (Tr. 95). Yet the Court's charge to the jury was too vague to specifically inform the jury of a crucial fact, namely - if the evidence of Leech's intoxication created a reasonable doubt whether he was sober enough to be capable of forming the specific intent to commit the robbery, it must find him not guilty. Edwards v. United States, 84 App. D.C. 310, 172 F 2d 884 (1949); 8 ALR 3rd 1236, 1246, 1247.

It was at the Court's suggestion that the issue of intoxication was first raised (Tr. 143, 144), but once this issue was raised it was incumbent upon the Court to adequately explain it to the jury. Otherwise the use of this defense was a mere formal exercise.

The Court stated intoxication is not in itself a defense to a charge of a crime, but the fact that the defendant may have been intoxicated at the time the offense was committed may negative the existence of a state of mind that is an essential element of the offense. That the specific intent to steal the property is an essential element of the offense of robbery. The Court further stated:

> ". . . Even though the Defendant may have been intoxicated with some degree or under the influence of intoxicating drink[1/], if you find that the Government

[1/] Emphasis added.

has proved beyond a reasonable doubt that the Defendant was capable of forming the specific intent to steal the property of the complainant and had the specific intent to steal the property of the complainant at the time he was alleged to have taken the property and that the Government has proved beyond all reasonable doubt all other essential elements of the offense of robbery, you may find the Defendant guilty. On the other hand, if you find that the Government has failed to prove beyond a reasonable doubt that at the time of the commission of the alleged offense, the Defendant was capable of forming the specific intent to steal the property of the complainant and had the specific intent to steal that property, you must find the Defendant not guilty" (Tr. 152, 153).

If this charge informs the jury of the rule which was stated in Edwards it does so only by inference. The charge is weighted in favor of the Government because after informing the jury they may still convict, even though the defendant was intoxicated, if they find he had the specific intent to steal, it does not specifically state the alternative - that

if because of defendant's intoxication they have a reasonable doubt of his ability to form the specific intent to steal, they must find him not guilty.[2/]

As Edwards teaches, the defendant need not be totally incapacitated, his behavior need only create a reasonable doubt as to his capacity to form the requisite intent. The Leech instruction appears to request that the jury resolve all reasonable doubt in favor of the prosecution.

When the jury returned for additional instructions after it had commenced its deliberations, the Court, when explaining the distinction between the two robbery counts, again instructed it concerning intoxication. The second charge was almost identical to the first so it does not change appellant's objection in this regard (Tr. 194, 195).

There was strong evidence of intoxication in this case but the vagueness of the Court's instruction concerning intoxication as a defense deprived Leech of that defense. As a result, the verdict of guilty to the charge of armed robbery should be reversed and the case remanded for a new trial.

2/ See Goings v. United States, 377 F. 2d 753, 757 (8th Cir., 1967) which recommends the intoxication instruction found in Mathes and Devitt, Federal Jury Practice and Instructions, p. 139, in response to a claim of vagueness in a similar charge.

III

THE MAKEUP OF THE PRELIMINARY HEARING WAS UNFAIR TO THE DEFENDANT.

(Tr. 22, 35, 94, 102, 103, 113-115, 123 - Tr. Prel. Hear. 5 - 10)

The preliminary hearing which was held in this case on January 26, 1970, was based entirely on the hearsay testimony of one police officer, Harry C. Seanor. His testimony contained numerous factual errors. He stated Willie Vincent saw Leech running through the alley right after the robbery with the owner of the store chasing him (Tr. Prel. Hear. 5). Evidence at the trial indicated that the owner of the store did not chase the gunman (Tr. 35). The wife of the owner of the store was not in the store when the robbery occurred (Tr. Prel. Hear. 6, Tr. 22). The officer also stated the people who had been robbed picked out a photograph of Leech (Tr. Prel. Hear. 5). The evidence clearly indicates that none of the people who were robbed picked out a photograph of Leech prior to the preliminary hearing, if indeed they ever did. The officer later admitted that Sarah Hart, who was not in the store at the time the robbery occurred, was the only person who identified a photograph of Leech (Tr. Prel. Hear. 7). The officer also identified Leech's companion as "Philadelphia Red" (Tr. Prel. Hear. 8). No "Philadelphia Red" was ever identified in this case and the officer admitted

at trial that he was mistaken about this (Tr. 123). The officer also testified that Sarah Hart knew the defendant as Leech (Tr. Prel. Hear. 9). Sarah Hart's trial testimony refuted this (Tr. 94, 102, 103). This misinformation made the preparation of a defense much more difficult because of the wasted time in trying to find "Philadelphia Red" and trying to straighten out the facts.

Defense counsel did not request that the Government's witnesses be subpoenaed (Appellate counsel is informed he was not aware of their identity at the time of the preliminary hearing) nor formally object to the makeup of the preliminary hearing, although he did object to a mere reading from the police report by an officer not connected with the case. However, if the Government is allowed to make a showing of probable cause on hearsay evidence alone then the defense should be granted wide latitude in cross-examining the police officers to ascertain their sources of information. One of the reasons for a preliminary hearing is to allow the defendant to obtain information concerning the evidence against him. Ross v. Sirica, 127 U.S. App. D.C. 10, 380 F 2d 557, 559 (1967). This right was severely curtailed in this case by the seeming desire of the judge to push the case through without delay. The Court would not allow defense counsel to determine if Sarah Hart had picked out a photograph of Willie Vinson or if she identified photographs of any other

~~persons~~ ~~de~~spite defense counsel's protest that Sarah Hart was not present and he was inquiring into the background of her identification (Tr. Prel. Hear. 8-10).

Perhaps the best example of the unfairness of this procedure was the exchange at a bench conference during the trial after the government had objected to defense counsel's attempt to elicit information from Officer Davidson concerning information he received from Willie Vincent. The Court stated, "I'm not going to let him testify to what Willie Vincent told him; it would be most prejudicial and most improper." (Tr. 113-115)

CONCLUSION

For the reasons stated in Points I and III herein the appellant requests that the guilty verdict be reversed and that the case be remanded for a new trial. For the reasons stated in Point II herein the Court is requested to reverse the verdict of guilty on the armed robbery charge and order a new trial on that count.

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BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,750

UNITED STATES OF AMERICA, *Appellee*,

v.

JAMES O. LEECH,
A/K/A JAMES LEEKS, *Appellant*.

Appeal from the United States District Court for the District of Columbia

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Cr. No. 534-70

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OTHER REFERENCES

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ISSUES PRESENTED *

In the opinion of appellee, the following issues are presented:

I. Did the trial court err in finding an independent source for Phillip Marshall's in-court identification?

II. Can this Court consider alleged deficiencies in the conduct of appellant's preliminary hearing where these deficiencies are asserted for the first time on appeal?

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* This case has not previously been before this Court.

United States Court of Appeals

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COUNTERSTATEMENT OF THE CASE

On March 31, 1970, the grand jury returned a four-count indictment charging appellant with armed robbery,[1] robbery,[2] and two counts of assault with a dangerous weapon.[3] On May 26, 1970, the Honorable William B. Bryant held a hearing on appellant's motion to suppress both a lineup identification and any subsequent in-court identification. Judge Bryant granted the motion to suppress testimony concerning the lineup identification but found that the Government had established sufficient independent basis for the in-court identification to permit its admission. On June 4, 1970, a jury trial commenced before Judge Bryant, and

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[1] 22 D.C. Code §§ 2901, 3202.

[2] 22 D.C. Code § 2901.

[3] 22 D.C. Code § 502.

on June 9 the jury returned verdicts of guilty on counts one (armed robbery),[4] three and four. Appellant was sentenced on October 1, 1970, to three to twelve years on count one and three to ten years each on counts three and four, to run concurrently. This appeal followed.

Preliminary Hearing

Officer Harry C. Seanor testified that he investigated the robbery of Jacobson's Liquor Store on November 1, 1969, with his partner, Robert L. Davis[5] (Tr. P.H. 4-5).[6] Seanor received information from one Willie Winston[7] that right after the robbery he saw appellant running through an alley with the owner of the store chasing him (Tr. P.H. 5). Officer Seanor also testified that he showed photographs to some of the people involved in the robbery and that appellant was identified (Tr. P.H. 5).

On cross-examination, Seanor stated that Mr. Harry Robbins, the proprietor, could make no photographic identification but that Mrs. Sarah Hart, who lived across the street from the store, did make an identification (Tr. P.H. 6-7). The officer further stated that Mrs. Hart observed appellant, whom she knew before this incident (Tr. P.H. 8), and another man[8] run past her apartment carrying a paper bag (Tr. P.H. 8). Appellant returned to Mrs. Hart's apart-

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[4] The jury was instructed not to consider the robbery count if it found appellant guilty of armed robbery (Tr. 163-164, 196).

[5] Davis was ill and unavailable to testify at the preliminary hearing.

[6] "Tr. P.H." refers to the transcript of the preliminary hearing; "Tr. M." refers to the transcript of the hearing on the motion to suppress; "Tr." refers to the transcript of the trial.

[7] "Winston" is referred to elsewhere as "Willie Vinson" and "Willie Vincent." It later developed that this witness could not be located either for the motion hearing or for trial (Tr. M. 77, 87).

[8] At the preliminary hearing, Officer Seanor testified that the other man was identified by Mrs. Hart as "Philadelphia Red" (Tr. P.H. 8). At trial, however, he stated that the "Philadelphia Red" appellation was connected with another robbery case in the same area. Officer Seanor testified that he had been confused at the preliminary hearing and that Mrs. Hart had not related this name to him (Tr. 123-124).

ment and told her that "they were looking for him; that he had just held up the liquor store across the street" (Tr. P.H. 8). Mrs. Hart knew appellant as "Leach" and knew also that he lived in the basement apartment at 1006 Massachusetts Avenue. Counsel was permitted to inquire about the number of people in the store when the robbery took place (Tr. P.H. 6) and to ask whether any evidence was recovered from appellant or the surrounding area when appellant was arrested (Tr. P.H. 6-7), whether appellant made any statements to the police (Tr. P.H. 7), whether Mrs. Hart recognized any of the photos as being of someone other than appellant,[9] and whether Mrs. Hart ever attended a lineup in this case (Tr. P.H. 10).

Identification

Detective Sergeant Thomas P. Reilly testified that he conducted the lineup in which appellant was identified by Phillip Marshall, an employee of Jacobson's Liquor Store, on February 26, 1970 (Tr. M. 6). A picture of the lineup was presented to the court (Tr. M. 6). Detective Sergeant Reilly further testified that appellant was forty-two years of age but that the other participants were all between the ages of fifteen and twenty-four (Tr. M. 9-11). The court suppressed testimony concerning the lineup, apparently because of the variance in age between appellant and the other participants (Tr. M. 85).

There was extensive testimony taken from Phillip Marshall and Officer Robert Davidson concerning Marshall's observation of the robbery and of its perpetrator (Tr. M. 22-72). Mr. Marshall testified that at approximately 10:50 a.m. on November 1 he was on duty as a clerk in Jacobson's (Tr. M. 23). Harry Robbins, the proprietor, and one or two customers were also in the store (Tr. M. 23-24). When appellant entered the store, Marshall was not occupied but was just "waiting for a customer to come in" (Tr. M. 25-

[9] Officer Seanor said that she recognized one other picture but that the individual in that picture had no relation to this case (Tr. P.H. 10).

26). In fact, Marshall was "looking at the door" when appellant entered (Tr. M. 26). Marshall's attention remained directed toward appellant after he entered because "he seemed to stagger" and "he was, you know, intoxicated" (Tr. M. 31-33). Appellant "looked suspicious" (Tr. M. 31). Marshall testified that he was very cautious and observant concerning the customers because the store had been robbed before, because some women employees had recently been harassed by some young hoodlums, and because the store was in a bad neighborhood (Tr. M. 31-33).

Marshall was about fifteen feet from the door when appellant first entered (Tr. M. 26-27). Appellant walked in through the open door, looked around for a moment, and then pulled a gun while Marshall was looking at him (Tr. M. 28). Appellant, brandishing the pistol, came over toward the counter where Marshall and Harry Robbins were standing (Tr. M. 28). Marshall was no more than five feet from appellant as he approached Robbins and the cash register (Tr. M. 28). While appellant ordered Robbins to empty the register, Marshall was "staring at him because I didn't know what he was going to do" (Tr. M. 29). It took Robbins thirty to sixty seconds to empty the register (Tr. M. 29). Appellant had no facial covering of any kind, no glasses and no hat. It was midday, and the store was brightly lit (Tr. M. 30). After appellant got the money and placed it in a bag, he ordered everyone to lie down [10] (Tr. M. 28-30). From the time appellant entered the store until the time he left, Marshall never took his eyes off him [11] (Tr. M. 31, 33).

Marshall immediately gave a description of appellant to the police: "Negro male, short built [*sic*], about five-six, five-seven, stocky, about 165 or 170 pounds, dark complexion . . . [with] a scar on [*sic*] his right eye" (Tr. M. 34).

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[10] At trial Marshall testified that, though the others lay down, he did not (Tr. 80). Robbins testified that Marshall was lying down by the time appellant left (Tr. 23).

[11] At trial Marshall said he had appellant in his view for at least two minutes (Tr. 81).

Marshall insisted throughout the proceedings that he mentioned the scar over appellant's eye to the police when he first saw them on November 1 (Tr. M. 34, Tr. 86). Officer Robert L. Davidson testified that he first talked with Phillip Marshall approximately two weeks after the robbery. At that time Marshall gave a similar description of appellant and mentioned the scar [12] (Tr. M. 65-66, Tr. 107).

After hearing the testimony,[13] the court ruled that "the Government has borne its burden, adequately, in establishing the independent basis for the in-court identification" (Tr. M. 84). The court made findings that Marshall "had an opportunity to observe him [appellant]," that "he was not the person who was robbed. He was an on-looker," that "he saw this man when he first came in the premises," that "the liquor store was well lighted," that "he was attracted to this man because, when he came in, he appeared

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[12] A police department report, Form PD-251, which was prepared on November 1 and which was read to the court at the motion hearing (Tr. M. 63), marked for identification at trial and used on cross examination of Officer Davidson (Tr. 108-110), gave a description of a suspect but contained no mention of a scar. It did mention that the suspect had a mustache (Tr. M. 63, Tr. 109). Marshall denied describing appellant as mustachioed (Tr. 85-86). Officer Davidson said he did not recall Marshall ever describing the suspect as wearing a mustache (Tr. 110). Partial clarification was made when, at the motion hearing, the form was referred to as a "composite" form to which more than one person may have contributed (Tr. M. 36, 63). There is no notation on the form as to who gave the description.

[13] There was testimony at the hearing as to whether Marshall ever made a photographic identification of appellant (Tr. M. 37-45, 47-50, 71-85). Marshall testified that he did look at photos on possibly three occasions prior to the lineup on February 26 (Tr. M. 43). He stated that he made an identification on at least one occasion (Tr. M. 49) and possibly two (Tr. M. 44, 47, 49). However, Officer Davidson said that he had shown some photographs to Marshall but that they were not in relation to this case (Tr. M. 71). As far as the officer knew, Mr. Marshall made no photographic identification in this case (Tr. M. 71). Marshall did admit that the store had been robbed more than once, that the officers had been in with pictures several times, and that he was not sure "whether it was for this case, or for another" (Tr. M. 49). In any event, since it was the Government's position that Marshall had made no photographic identification but that he was confused as to when he had looked at photos (Tr. M. 75-76), no photographic identification testimony was introduced by the Government at trial. Appellant's trial counsel chose not to inquire into the matter at trial.

to be a little bit intoxicated," that "he looked a little bit suspicious," that "he was standing in four or five feet of him," that he "had never taken his eyes off of him," that he had "no disguise," and that "he [gave] a very accurate description" of appellant, including the scar, which the court personally observed (Tr. M. 83-84).

Trial

At trial Marshall testified substantially as he did at the suppression hearing. The only identification by Marshall before the jury was the in-court identification (Tr. 84). Harry Robbins testified that on November 1, 1969, while he was behind the counter, a man walked in, pulled a gun and ordered him to turn over the money (Tr. 20). The man ordered Robbins not to look at him, and Robbins obeyed (Tr. 20-21). Phillip Marshall, two customers who were never identified, and another employee who later disappeared were also in the store (Tr. 23). Robbins gave no description of the suspect at the scene (Tr. 26), nor did he make any identification at trial (Tr. 26-27).

Sarah Hart, the resident manager of an apartment building at 1020 10th Street, N.W., testified that a little after 11:00 a.m. on November 1, 1969, she was in her apartment when appellant, whom she had seen "quite often in the neighborhood,"[14] ran by her door carrying a brown paper bag (Tr. 92-94). Mrs. Hart heard appellant arguing, so she went upstairs and listened (Tr. 94). She heard appellant arguing with another man about dividing up some money. Appellant said he did not think it was right for his companion to take most of the money, since appellant had "pulled the job by himself" (Tr. 94). The friend remarked "that 'it was my gun, but if you [appellant] had gotten caught with it, it would have been yours' " (Tr. 95). Mrs. Hart returned to her apartment and was followed by appellant (Tr. 95). Appellant asked for a hat and coat and

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[14] At some time prior to November 1, 1969, she had seen appellant "practically every day" (Tr. 101).

stated that "he just robbed a liquor store" (Tr. 95). Mrs. Hart could smell whiskey on appellant and observed that he was "reeling and rocking" (Tr. 97). She inquired as to how he could rob a liquor store when he was drunk (Tr. 95). Appellant said, "If you don't believe me, look out the window" (Tr. 95). Mrs. Hart saw two police cars across the street. Appellant asked to stay in the apartment until the police left, but Mrs. Hart refused to let him.

Appellant denied being in Jacobson's on November 1. He claimed he was working "catch out" for Allied Van Lines doing some moving (Tr. 126-127). Appellant was unable to remember the exact location where he worked (Tr. 138-139), the names of the people whom he helped move (Tr. 139), the names of his co-workers (Tr. 139), or the name of his driver (Tr. 139). He denied having a conversation with Sarah Hart, but he admitted seeing her before.

Although appellant's counsel [15] had not requested it, the trial court thought that an instruction should be given on intoxication as it related to specific intent (Tr. 143-144). Counsel agreed and stated that he chose not to develop that phase of the case but rather to rely on his alibi defense (Tr. 143-145). Counsel requested no specific instruction but only the "instruction on intoxication" (Tr. 146). The court gave the "standard instruction" [16] on intoxication in its original charge (Tr. 162-163), and again when the jury requested reinstruction as to the difference between counts one and two of the indictment (Tr. 194-195). No objections were raised to the intoxication instruction or to any other (Tr. 167-168).

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[15] Appellant is represented by different counsel on appeal.

[16] Junior Bar Section of the D.C. Bar Ass'n, Criminal Law Instructions for the District of Columbia, No. 125 (1966).

ARGUMENT

I. The in-court identification of appellant was properly admitted into evidence.

(Tr. M. 1-87, Tr. 77-92)

Appellant contends that the trial court committed reversible error in allowing Phillip Marshall to make an in-court identification of appellant. He claims that such an identification was tainted by the viewing of appellant in a suggestive lineup. Appellee submits that the record in this case clearly negates such a contention. The trial court ruled that the lineup was unfair and therefore excluded all government testimony concerning it (Tr. 72, 85) [17] But the court specifically held that there was an independent basis for Marshall's identification of appellant and that Marshall would therefore be permitted to make an in-court identification.[18]

Wade established that the government must show by clear and convincing evidence that the in-court identification was based upon observations of the suspect other than the tainted confrontation.[19] Appellee submits that the facts elicited at the hearing on the motion to suppress and at trial [20] clearly show that the in-court identification was grounded in the witness' observation of appellant at the scene of the robbery.

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[17] The court presumably relied on the rationale of *Stovall* v. *Denno*, 388 U.S. 293, 301-302 (1967).

[18] *See United States* v. *Wade*, 388 U.S. 218, 240 (1967); *Clemons* v. *United States*, 133 U.S. App. D.C. 27, 34, 408 F.2d 1230, 1237 (1968) (*en banc*), *cert. denied*, 394 U.S. 964 (1969).

[19] *United States* v. *Wade*, *supra* note 18, 388 U.S. at 240.

[20] The trial court did make a finding of independent source in ruling on the pre-trial motion (Tr. M. 84). In reviewing that determination this Court, of course, may take into account the entire record, including the subsequent testimony at trial. *United States* v. *Kemper*, —— U.S. App. D.C. ——, —— n.24, 433 F.2d 1153, 1156 n.24 (1970).

During the course of the robbery Marshall had an excellent opportunity to observe appellant.[21] When appellant entered the store, Marshall was "looking right at the door" (Tr. M. 26). Marshall never took his eyes off appellant (Tr. M. 31-33). Furthermore, he was not the object of the robber's mischief and could therefore watch from a relatively detached position. Marshall paid particular attention [22] to appellant from the time he entered the store until the time he left because appellant "looked suspicious" and seemed to be intoxicated (Tr. M. 31-33). Appellant was never out of the witness' sight and was, at one point, no more than five feet away from him (Tr. M. 28).[23] The lighting in the store was excellent.[24] The record indicates that Marshall was receptive to the stimuli that opportunity provided.[25] When the police arrived, he gave a detailed description [26] which later proved to be accurate.[27] There

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[21] *See United States* v. *Wade*, *supra* note 18, 388 U.S. at 241; *United States* v. *Miller*, D.C. Cir. No. 22,332, decided March 19, 1971, slip op. at 7; *United States* v. *Kemper*, *supra* note 20, —— U.S. App. D.C. at ——, 433 F.2d at 1156; *United States* v. *Terry*, 137 U.S. App. D.C. 267, 272, 422 F.2d 704, 709 (1970); *Hawkins* v. *United States*, 137 U.S. App. D.C. 103, 105, 420 F.2d 1306, 1308 (1969); (*Anthony*) *Long* v. *United States*, 137 U.S. App. D.C. 311, 315, 424 F.2d 799, 803 (1969).

[22] *See Hawkins* v. *United States*, *supra* note 21, 137 U.S. App. D.C. at 105, 420 F.2d at 1308.

[23] *See United States* v. *Miller*, *supra* note 21, slip op. at 7; *United States* v. *Kemper*, *supra* note 20, —— U.S. App. D.C. at ——, 433 F.2d at 1156; *United States* v. *Terry*, *supra* note 21, 137 U.S. App. D.C. at 272, 422 F.2d at 709.

[24] *See United States* v. *Kemper*, *supra* note 20, —— U.S. App. D.C. at ——, 433 F.2d at 1156; *United States* v. *Terry*, *supra* note 21, 137 U.S. App. D.C. at 272 422 F.2d at 709; *Hawkins* v. *United States*, *supra* note 21, 137 U.S. App. D.C. at 105, 420 F.2d at 1308; *Gregory* v. *United States*, 133 U.S. App. D.C. 317, 324, 410 F.2d 1016, 1023, *cert. denied*, 396 U.S. 865 (1969).

[25] *United States* v. *Kemper*, *supra* note 20, —— U.S. App. D.C. at ——, 433 F.2d at 1157.

[26] Appellant attacks the accuracy of the description given to the police since no reference is made to the scar in the police Form PD-251 which was prepared the day of the robbery. Marshall was adamant that he told the police about

were two unusual and distinctive characteristics of appellant which the witness observed, *i.e.*, his state of intoxication and the scar over his right eye (Tr. M. 31-34). These observations were subsequently validated by Mrs. Hart's unimpeached testimony concerning appellant's inebriated state (Tr. 95-97) and by the exhibition of appellant's scar to the trial court (Tr. M. 83-84). Marshall was unswerving in his identification of appellant at all stages of the proceedings in spite of rigorous cross-examination.[28] These circumstances provided an ample evidentiary showing that Phillip Marshall had obtained and retained a mental image of appellant prior to the lineup.[29]

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the scar on the scene. In any event, in *United States* v. *Kemper supra* note 20, the witness testified at trial that the defendant had a scar on his face, but there was no mention of the scar in the police report. This Court found that there may have been several reasons for this omission other than the witness' failure to observe the scar and that the omission was of little significance. —— U.S. App. D.C. at —— n.31, 433 F.2d at 1157 n.31.

[27] *See United States* v. *Wade, supra* note 18, 388 U.S. at 241; *Kemper* v. *United States, supra* note 20, —— U.S. App. D.C. at ——, 433 F.2d at 1157; *Hawkins* v. *United States, supra* note 21, 137 U.S. App. D.C. at 105, 420 F.2d at 1308; *Clemons* v. *United States, supra* note 18, 133 U.S. App. D.C. at 38, 408 F.2d at 1241.

[28] *See Simmons* v. *United States*, 390 U.S. 377, 385 (1968); *United States* v. *Kemper, supra* note 20, —— U.S. App. D.C. at ——, 433 F.2d at 1158; *United States* v. *Terry, supra* note 21, 137 U.S. App. D.C. at 272, 422 F.2d at 709; *Gregory* v. *United States, supra* note 24, 133 U.S. App. D.C. at 324, 410 F.2d at 1023.

[29] Appellant's contention that the in-court identification is somehow tainted by the confusion surrounding Marshall's photographic identification is without merit. The Government's explanation that Marshall had been shown photographs for other robberies at Jacobson's and that he was merely confused as to whether he made an identification in this case is altogether reasonable. There is in any event such overwhelming evidence that Marshall had formed an indelible image of the appellant at the time of the robbery that neither the lineup nor any possible photographic viewing could have had any effect on his identification. Of course this confusion was ripe for appellant to attack at trial, but appellant chose not to do so. Appellant misreads the transcript when he claims (Appellant's Brief at 17) that the trial court "dissuaded" appellant from exploring the photographic identification. The court merely pointed out some of the possible dangers to appellant in pursuing such a course. At no time did the court forbid or discourage counsel's approach but merely sought guidance as to his purpose (Tr. 87-90).

This court has recognized that appellant has a heavy burden in striving to overcome the trial court's finding of independent source.[30] *Clemons* recognized the "key role which the trial court, because of its direct exposure to the witnesses, plays in any such determination" of independent source.[31] The trial court's determination in this case is, we submit, beyond challenge, particularly in light of the other evidence presented. Mrs. Hart's devastating testimony concerning her observations of appellant on the day of the robbery and his spontaneous confession to her that he had just held up the liquor store can leave little doubt that the right man was apprehended. The entire record presents no likelihood at all of irreparable misidentification.[32]

II. Appellant's failure to object to alleged defects in the conduct of the preliminary hearing prior to trial bars any assertion of those claims after conviction.

(Tr. P.H. 1-10)

Appellant claims that his preliminary hearing was unfair. Appellee has some difficulty in ascertaining exactly what appellant finds objectionable and in what way he claims to have been prejudiced. The record shows that appellant was represented by counsel at the preliminary hearing. Appellant raised no objection to the conduct of the preliminary hearing until after his conviction. When appellant is represented by counsel at all stages, failure to assert alleged defects in the conduct of the preliminary hearing prior to

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[30] *United States* v. (*Clinton*) *Long*, 137 U.S. App. D.C. 275, 278, 422 F.2d 712, 715 (1970); *see United States* v. *Kemper*, *supra* note 20, —— U.S. App. D.C. at ——, 433 F.2d at 1158.

[31] *Clemons* v. *United States*, *supra* note 18, 133 U.S. App. D.C. at 38, 408 F.2d at 1241.

[32] *See United States* v. *Miller*, *supra* note 21, slip op. at 7; *Mendoza-Acosta* v. *United States*, 139 U.S. App. D.C. 143, 146, 430 F.2d 516, 519 (1970); (*Anthony*) *Long* v. *United States*, *supra* note 21, 137 U.S. App. D.C. at 316-317, 424 F.2d at 805; *Clemons* v. *United States*, *supra* note 18, 133 U.S. App. D.C. at 47, 408 F.2d at 1250.

trial forecloses any reliance on those defects after conviction. No post-conviction relief is available when appellant could have raised the alleged defects prior to trial and failed to do so.[33] The record also shows that there was sufficient evidence introduced to establish probable cause and that appellant was afforded some latitude—more than the law requires—in discovering "the foundation of the charge and the evidence that will comprise the Government's case."[34] Furthermore, there has been no showing whatsoever that appellant was prejudiced at trial by the conduct of the preliminary hearing.[35] Appellant has no basis for reversal here.[36]

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

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[33] *Blue* v. *United States*, 119 U.S. App. D.C. 315, 321-322, 342 F.2d 894, 900-901 (1964), *cert. denied*, 380 U.S. 944 (1965).

[34] *See Ross* v. *Sirica*, 127 U.S. App. D.C. 10, 12, 380 F.2d 557, 559 (1967); *Blue* v. *United States*, *supra* note 33.

[35] *Stith* v. *United States*, 124 U.S. App. D.C. 81, 82-83, 361 F.2d 535, 536-537 (1966); *Shelton* v. *United States*, 120 U.S. App. D.C. 65, 66, 343 F.2d 347, 348, *cert. denied*, 382 U.S. 856 (1965); *Blue* v. *United States*, *supra* note 33.

[36] Appellant also claims error in the court's instruction on intoxication. Since appellant failed to object—in any manner—to the court's instruction on intoxication, he is precluded from raising that issue on appeal, FED. R. CRIM. P. 30; *see United States* v. *Salzman*, 131 U.S. App. D.C. 393, 397, 405 F.2d 358, 362 (1968), unless the instruction constitutes plain error. FED. R. CRIM. P. 52 (b). The trial court gave the standard "red book" instruction on intoxication, which adequately stated the law on the subject. *Heideman* v. *United States*, 104 U.S. App. D.C. 128, 131-132, 259 F.2d 943 (1958), *cert. denied*, 359 U.S. 859 (1959). We see no foundation for a valid claim of plain error.

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